

STATE OF MICHIGAN  
COURT OF APPEALS

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JOSEPH M. HALEY,

Plaintiff-Appellant,

v

NUNDA TOWNSHIP,

Defendant-Appellee.

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UNPUBLISHED

January 18, 2005

No. 250082

Cheboygan Circuit Court

LC No. 02-006984-CZ

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

In this Freedom of Information Act, MCL 15.231 *et seq.*, case, we are asked to determine whether a public body may impose a flat fee, payable in advance, for a subscription to a copy of minutes from the meetings of the public body. We agree with the trial court that such fees are proper under the act and affirm.

Defendant Nunda Township offered a subscription to the minutes from its township board meetings. It created a flat fee of \$25, payable in advance, for a six-month period (or \$50 for a one-year period). This is not the only method offered by defendant to obtain copies of the minutes. Copies of the minutes are available at the library and at the Township Hall (though apparently the Township Hall is open on a limited basis each week). Additionally, copies of the previous meeting's minutes are distributed at each meeting, as well as being printed in the local newspaper. Although defendant acknowledges that the exact cost of preparing and mailing the minutes on a subscription basis will vary with the number of pages of minutes from each meeting, as well as the amount attachments, defendant maintains that the actual cost exceeds \$50 for any six-month period (a calculation which plaintiff maintains grossly overstates the cost of providing the subscription).

Plaintiff objected to the advance payment of the fee and instituted this action under the FOIA. The trial court ruled the subscription fee is permissible and the amount imposed was reasonable. Plaintiff challenges both the trial court's rulings on plaintiff's motions for summary disposition, as well as the trial court's ultimate determination of the matter. But the issues are the same for both and do not require separate analysis.

We review the trial court's factual finding for clear error, but its application of the law to the facts de novo. *Scroeder v Detroit*, 221 Mich App 364, 366; 561 NW2d 497 (1997). The

construction of a statute is a question of law that is also reviewed de novo. *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 227; 532 NW2d 903 (1995).

The FOIA clearly grants the right to subscribe to a regularly created public record. MCL 15.233(1) provides in pertinent part as follows:

A person has a right to subscribe to future issuances of public records that are created, issued, or disseminated on a regular basis. A subscription shall be valid for up to 6 months, at the request of the subscriber, and shall be renewable.

What is less clear is the provision for imposing fees. MCL 15.234 authorizes a public body to impose a fee to fulfill an FOIA request, but it limits that fee to the actual cost of duplicating and mailing the document. It further authorizes an advance payment only if the total fee will exceed \$50, and then only authorizes the advance payment of a deposit of one-half of the anticipated fee. The statute does not specifically address the issue of a fee for a subscription. The question before us then becomes whether a public body may impose a flat fee for a subscription, rather than charging the actual cost of providing that subscription, and may impose that fee in advance. We hold that it is so authorized.

In interpreting a statute, we discern and give effect to the Legislature's intent as reflected by the statutory language. *Halloran v Bhan*, 470 Mich 572, 576; 683 NW2d 129 (2004). Where the statute does not define a term, we apply the term's plain and ordinary meaning, consulting a dictionary if necessary. *Id.* at 578.

Because the FOIA does not define the term "subscription," we shall look to the dictionary for guidance. The definition of "subscription" in the Random House Webster's College Dictionary includes the following: "a sum of money given or pledged as a contribution, payment, investment, etc." and "the right to receive a periodical or cable television service, attend a series of concerts or plays, etc., for a sum paid." Turning to Webster's New Collegiate Dictionary, "subscription" is defined in part as "a purchase by prepayment for a certain number of issues (as of a periodical)."

Accordingly, we conclude that the plain and ordinary meaning of the word "subscription" implies an advance payment of a sum certain in order to receive the material for a set period of time. Furthermore, because the term "subscription" envisions an advance payment, of necessity it cannot require that such payment be the "actual cost" inasmuch as it is impossible to determine in advance what the actual cost will be because the number of pages varies.

Moreover, we recognize that the general legislative scheme is to allow the public body to recover its actual costs in complying with an FOIA request, "nothing more, nothing less." *Tallman v Cheboygan Area Schools*, 183 Mich App 123, 130; 454 NW2d 171 (1990). But the Legislature's leaving "subscription" undefined, and thus requiring the use of its common definition, is not inconsistent with this overall legislative scheme. While defendant is obligated under the FOIA to offer a subscription to the minutes, plaintiff is not obligated to receive his minutes through a subscription. That is, the availability of a subscription to the minutes does not relieve defendant of its obligation to also provide minutes on the basis of individual requests, made after the minutes are prepared, for which it may only charge the actual costs of providing

those copies. Thus, plaintiff, or any other citizen, may continue to make individual requests for each set of minutes, after the fact, and pay the actual costs for those minutes as he procures each.

Therefore, a potential subscriber may make the determination whether the subscription represents a fair value relative to separate individual requests, either because of an actual cost savings or because of the convenience factor. For that matter, a public body may decide to offer a subscription at a relatively low cost to encourage subscriptions and reduce the need to process individual requests on an on-going basis. In other words, it is conceivable that, because the subscription feature represents a convenience option (to either the citizen or the public body), the Legislature left the fee for the option unregulated, with the ultimate control against abuse in setting that fee being the availability of the individual request at actual cost. But ultimately it is unnecessary to rationalize the Legislature's behavior; it is only necessary to determine what the Legislature did as expressed through the words of the statute itself. And in this case, the statute does not provide for regulation of the price of the subscription option.

In sum, the plain and ordinary meaning of the word "subscription" includes the payment of a flat fee in advance for the right to receive material for a set period of time. Because the Legislature neither provided an alternate definition to "subscription" in the FOIA nor included the subscription fee in the fee regulation provisions, the common definition prevails. Thus, defendant was free to set a fee for a subscription to the board minutes, and to require payment in advance, without regard to the actual cost of providing such a subscription.

Finally, plaintiff argues that defendant failed to include the statement of his FOIA rights with the denial of his request as required by MCL 15.235(4). Defendant argues that it did not have to include the statement because it was not denying plaintiff's request, it was merely requesting payment for the subscription before processing it and, in any event, because of plaintiff's past FOIA requests, he had actual knowledge of his rights under the act. The trial court in effect granted declaratory relief in favor of plaintiff, directing defendant in the future to include such a statement, despite plaintiff's actual knowledge of his rights. We agree with defendant that a statement was unnecessary because there was no denial, merely a request for payment. In any event, even if a statement was required under the circumstances, we are not persuaded that the trial court erred in determining that declaratory relief alone was adequate under the circumstances.

Turning to the dissent, we believe that the dissent misapprehends both the limited nature of our opinion and the interaction of § 3<sup>1</sup> and § 4<sup>2</sup> of the FOIA.

The dissent argues that the FOIA does not allow the township to prebill for a six-month subscription, because, if this is allowed, then the fee charged may be in excess of the "precise" actual cost associated with the specific request and corresponding tasks. Yet the dissent ignores the trial court's well-reasoned analysis that § 4 (that addresses permissible costs and charges)

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<sup>1</sup> MCL 15.233.

<sup>2</sup> MCL 15.234.

deals with existing records, not subscriptions or future records and § 3 covers future records, but says nothing about either prohibiting or requiring advance payments or prebillings. Also, the dissent ignores the important fact that the FOIA does not expressly prohibit prebilling or prepayments. Instead, the dissent incorrectly suggests that absent express legislative authorization, prebilling is prohibited. And, finally, the dissent merely sidesteps the inconvenient fact that by using the term subscriptions,<sup>3</sup> our Legislature clearly contemplates charges in advance of sending out the documents.

And here, where the township's options are to send a bill before sending out each package, wait for the payment and then send the documents [or bill before or after the documents are mailed], a reasonable alternative is to prebill for six months<sup>4</sup> so long as this is not done to prevent requests or circumvent the purposes of the FOIA. Clearly, the township here bent over backwards to comply with the FOIA and thus made copies of the township meeting minutes available free of charge by placing these copies in the township library and the township hall, and by paying to have them published in the Wolverine Area Press each month.<sup>5</sup>

Moreover, and importantly, the trial court found, and the dissent agrees, that the fee charged here is reasonable, a finding that strongly supports township testimony that its fee is insufficient to recoup its costs associated with the requisite tasks of mailing minutes<sup>6</sup> to plaintiff.

Further, we agree with the trial court's determination that this matter is neither controlled by nor inconsistent with *Tallman*, *supra*, because *Tallman* did not deal with subscriptions, as does the instant case, but rather, with specific requests for existing documents. In *Tallman*, unlike here, no estimates needed to be made for future deliveries: the issue here is prebilling for subscriptions for future delivery of anticipated documents.

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<sup>3</sup> As the trial court noted, *Webster's New Collegiate Dictionary* defines subscription as "a purchase by prepayment for a certain number of issues." Our Legislature mandates that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language." MCL 8.3a; see *Acer Paradise, Inc v Kalkaska Co Rd Comm*, 262 Mich App 193, 197; 684 NW2d 903 (2004), citing *Rakestraw v General Dynamics Land Systems, Inc*, 469 Mich 220, 224; 666 NW2d 199 (2003), citing MCL 8.3a; see also *Cleary Trust v Muzyl Trust*, 262 Mich App 485, 497; 686 NW2d 770 (2004) ("Words not defined in a statute should be accorded their plain and ordinary meaning"), citing *Theisen v Knake*, 236 Mich App 249, 253; 599 NW2d 777 (1999). It is routine practice for our courts to refer to the dictionary for such a purpose. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002); *Cleary Trust*, *supra* at 497 n 8.

<sup>4</sup> Six months is the time period set forth in the statute

<sup>5</sup> Nunda Township also sent them to plaintiff, free of charge, until a citizen complained.

<sup>6</sup> The trial court noted that "the evidence establishes that the township clerk would have to make copies of the proposed minutes as well as the actual minutes for each monthly meeting. These minutes would average approximately two pages in length or four pages for the month. In addition, there could be special meetings called and also there could be attachments, such as resolutions, attached to the minutes." Trial Court's Opinion and Order, July 11, 2003, p 4.

Our Legislature did not prescribe a specific methodology to calculate this precise fact situation, but the township acted reasonably and charged a reasonable fee designed, as best it could, to recoup its costs. The township sought neither to conceal documents nor avoid its obligations under the FOIA. Accordingly, we agree with the trial court's ruling, and respectfully disagree with our dissenting colleague.

Affirmed.

/s/ David H. Sawyer

/s/ Henry William Saad